

LAWLER, METZGER & MILKMAN, LLC

2001 K STREET, NW  
SUITE 802  
WASHINGTON, D.C. 20006

DOCKET FILE COPY ORIGINAL

DENISE HARRISON.  
PHONE (202) 777-7737

PHONE (202) 777-7700  
FACSIMILE (202) 777-7763

**BY HAND**

**Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554  
c/o**

**236 Massachusetts Avenue, NE Suite 110  
Washington, D.C. 20002**

**RECEIVED**

**OCT - 4 2004**

**Federal Communications Commission  
Office of Secretary**

**REDACTED -  
FOR PUBLIC INSPECTION**

LAWLER, METZGER & MILKMAN, LLC

2001 K STREET, NW  
SUITE 802  
WASHINGTON, D.C. 20006

A. RENÉE CALLAHAN  
PHONE (202) 777-7723

PHONE (202) 777-7700  
FACSIMILE (202) 777-7763

**REDACTED – FOR PUBLIC INSPECTION**

October 4, 2004

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street SW  
Washington, DC 20554

**RECEIVED**

**OCT - 4 2004**

**Federal Communications Commission  
Office of Secretary**

Re: Unbundled Access to Network Elements,  
WC Docket No. 04-313, CC Docket No. 01-338

Dear Ms. Dortch:

This letter provides notice for the public record that undersigned counsel to MCI filed the attached Declaration of Terry Murray, which contains Confidential Information, under seal and subject to the Protective Order, DA 04-2603, as subsequently modified by DA 04-3152, in the above-referenced proceeding.

The unredacted, confidential version of this filing is being hand delivered to you, as well as to Janice Myles, Competition Policy Division, Wireline Competition Bureau, as required by the Protective Order. The confidential version will be made available for inspection pursuant to the terms of the Protective Order. Arrangements may be made by contacting the undersigned at 202-777-7700.

Two copies of the filing, as redacted, are submitted herewith pursuant to the Protective Order. If you have any questions or require further information, please do not hesitate to contact me.

Sincerely,



A. Renée Callahan

cc: Janice Myles  
Gary Remondino

No. of Copies rec'd 01  
List ABCDE

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

**RECEIVED**

**OCT - 4 2004**

**Federal Communications Commission  
Office of Secretary**

In the Matter of	)	
	)	
Unbundled Access to Network Elements	)	WC Docket No. 04-313
	)	
Review of the Section 251 Unbundling	)	
Obligations of Incumbent Local Exchange	)	CC Docket No. 01-338
Carriers	)	

**DECLARATION OF TERRY L. MURRAY**

October 4, 2004

**REDACTED – FOR PUBLIC INSPECTION**

## TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	ANALYSIS OF TRIGGERS ON A MARKET-BY-MARKET BASIS .....	2
A.	Introduction – Retail and Wholesale Triggers .....	2
B.	Commission Guidance for Identifying Relevant Competitors.....	4
1.	Corporate Ownership .....	5
2.	Active and Continuing Participation in the Mass Market.....	7
a)	De minimis test.....	8
b)	Qualitative test for active and continuing participation.....	10
c)	Verification that the carrier is actively providing service to mass-market customers and plans to continue doing so .....	11
3.	Intermodal Competition .....	18
4.	Scale of Market Participation .....	18
C.	“Automated” Application of Trigger Analysis .....	21
III.	ANALYSIS OF TRIGGERS ON A MARKET-BY-MARKET BASIS .....	22
A.	Background and Approach to Trigger Analysis .....	22
B.	Most of the Potential Triggering Companies Identified by SBC and Verizon Do Not Provide a Real and Current Competitive Alternative for Most California Mass-Market Customers .....	23
1.	Advanced Telecom Group .....	24
2.	Allegiance Telecom .....	25
3.	AT&T .....	25
4.	Comcast .....	26
5.	Cox.....	27
6.	ICG Communications .....	27
7.	MCI.....	28
8.	MPower Communications .....	30
9.	RCN .....	31
10.	SBC Telecom.....	32
11.	TelePacific Communications .....	32
12.	Telscape Communications .....	33
13.	XO Communications .....	35
14.	Xspedius .....	36
C.	The ILECs’ Trigger Evidence Did Not Demonstrate a Lack of Impairment in Any California Wire Center.....	36

**LIST OF EXHIBITS**

- EXHIBIT 1: CURRICULUM VITAE OF TERRY L. MURRAY
- EXHIBIT 2: (ELECTRONIC ONLY) SPREADSHEET TOOL SHOWING TRIGGER ANALYSIS FOR SBC CALIFORNIA
- EXHIBIT 3: (ELECTRONIC ONLY) SPREADSHEET TOOL SHOWING TRIGGER ANALYSIS FOR VERIZON CALIFORNIA
- EXHIBIT 4: INSTRUCTIONS FOR USE OF SPREADSHEET TOOL
- EXHIBIT 5: **PROPRIETARY** SUMMARY TABLES REPORTING RESULTS OF SBC AND VERIZON CALIFORNIA TRIGGER ANALYSES
- EXHIBIT 6: MAPS SHOWING RESULTS OF SBC AND VERIZON CALIFORNIA TRIGGER ANALYSES

**I. INTRODUCTION**

1. My name is Terry L. Murray. I am President of the consulting firm Murray & Cratty, LLC. My business address is 8627 Thors Bay Road, El Cerrito, CA 94530.
2. I am an economist specializing in analysis of regulated industries. I received an M.A. and M.Phil. in Economics from Yale University and an A.B. in Economics from Oberlin College. At Yale, I was admitted to doctoral candidacy and completed all requirements for the Ph.D. except the dissertation. My curriculum vitae, included as Exhibit 1 to this declaration, provides complete detail concerning my qualifications and experience.
3. MCI, Inc. ("MCI") has asked me to discuss use of a "trigger" or actual deployment test, such as the one that the Commission described in its *Triennial Review Order*,<sup>1</sup> to determine whether competitive local exchange carriers ("CLECs") would be impaired in their ability to provide local exchange services to mass-market customers if they were denied access to unbundled local switching at prices based on Total Element Long Run Incremental Cost ("TELRIC"). My declaration first provides a conceptual outline of an

---

<sup>1</sup> *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers (CC Docket No. 01-338); Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 (CC Docket No. 96-989); Deployment of Wireline Services Offering Advanced Telecommunications Capability (CC Docket No. 98-147), FCC No. 03-36, (rel. Aug. 21, 2003) (hereinafter, "*Triennial Review Order*" or "*TRO*").

economically meaningful approach to the trigger test described in the *TRO* (Section II below) and then illustrates the application of my recommended methodology using data filed by SBC Communications, Inc. ("SBC") and Verizon Communications, Inc. ("Verizon") in the California impairment proceeding to support their claims of no impairment in large portions of that state (Section III).<sup>2</sup> To aid the Commission in applying this methodology, I also am providing a CD with a spreadsheet tool that facilitates analysis of trigger claims by incumbent local exchange carriers ("ILECs") for the individual wire-center markets that Dr. Pelcovits recommends in his declaration. The CD contains Exhibits 2 and 3, which are versions of the spreadsheet tool formatted for use with the data that SBC and Verizon, respectively, provided in the California proceeding.<sup>3</sup> Exhibit 4, contained on the CD and also attached hereto, provides instructions for use of the spreadsheet tool.

## **II. ANALYSIS OF TRIGGERS ON A MARKET-BY-MARKET BASIS**

### **A. Introduction – Retail and Wholesale Triggers**

4. The Commission's *Triennial Review Order* established "trigger" analyses as a way of using actual marketplace evidence to assess the presence or absence of

---

<sup>2</sup> California Public Utilities Commission ("CPUC") Rulemaking ("R.") 95-04-043 and Investigation ("I.") 95-04-044, Rulemaking and Investigation on the Commission's Own Motion into Competition for Local Exchange Service (FCC Triennial Review 9-Month Phase).

<sup>3</sup> The public version of the CD provided redacted versions of the spreadsheets with all data removed.

barriers that could make entry unprofitable without access to unbundled local switching.<sup>4</sup> Specifically, the Commission identified both a self-provisioning (or “retail”) trigger and a wholesale trigger.

5. The self-provisioning, or “retail,” trigger relates to the number of competitors that are self-deploying switching to provide retail local exchange services to mass-market customers located in each geographic market. The *Triennial Review Order* required that there be at least three such competitors in a given geographic market to satisfy the retail trigger and thereby justify a finding of no impairment in the geographic market.<sup>5</sup>
6. The competitive wholesale facilities, or “wholesale” trigger, relates to the number of competitors that own their own switches and are offering wholesale switching services that would enable other competitors to provide retail local exchange services to mass-market customers located in each geographic market. The *Triennial Review Order* required that there be at least two such competitors in a given geographic market to satisfy the wholesale trigger and thereby justify a finding of no impairment in the geographic market.<sup>6</sup>
7. The Commission observed that no party to the *Triennial Review* proceeding had provided evidence of any third-party (wholesale) offerings of local circuit

---

<sup>4</sup> *Triennial Review Order*, ¶ 461.

<sup>5</sup> *Id.*, ¶ 501.

<sup>6</sup> *Id.*, ¶ 504.



switching that could substitute for the ILEC's unbundled switching.<sup>7</sup> Consistent with this observation, I am not aware of any incumbent that claimed in a state proceeding that the wholesale trigger has been met for mass-market switching. Hence, it is unlikely that the wholesale trigger will be relevant in this proceeding. In the discussion that follows, I address only the retail trigger.

8. The Commission can determine whether the triggers have been met in a particular market by applying the rules and other guidance it established in the *Triennial Review Order* in a manner that comports with the pro-competitive goals of the Act and sound economic principles. Below, I describe the Commission's *Triennial Review Order* guidance and explain how the Commission can apply those concepts in a meaningful way.

**B. Commission Guidance for Identifying Relevant Competitors**

9. In addition to the basic requirement that potential triggering companies must be "using or offering their own separate switches,"<sup>8</sup> the Commission identified specific rules or provided general guidance with respect to the following:

---

<sup>7</sup> *Id.*, ¶ 442.

<sup>8</sup> *Triennial Review Order*, ¶ 499. In footnote 1551 to that paragraph, the Commission described the only instance in which a company that does not own the switches in question may be counted toward the retail trigger:

While the record indicates that competitors do not currently purchase wholesale switching from non-incumbent-LEC providers, we find, for the limited purposes described herein, that *if a carrier were to acquire the long term right to the use of a non-incumbent-LEC switch sufficient to serve a substantial portion of*  
(continued)

- (1) Corporate ownership;
- (2) Active and continuing participation in the mass market;
- (3) Intermodal competition; and
- (4) Scale of market participation.

I discuss each of these categories below.

**1. Corporate Ownership**

- 10. In its *Triennial Review Order*, the Commission imposed two separate restrictions on corporate ownership. First, a carrier can only count toward the retail or wholesale trigger in a particular market if that carrier is unaffiliated with the ILEC.<sup>9</sup> Second, to prevent “gaming,” carriers affiliated with one another, but not the incumbent, only count as a single carrier toward satisfying the pertinent trigger.<sup>10</sup>
- 11. Consistent with the spirit of the *Triennial Review Order*, I recommend that the Commission apply the “ILEC affiliate” criterion in a manner that screens out *all* ILEC affiliates, regardless of whether they are affiliates of the incumbent in that geographic market. The logic of the retail trigger test is to determine whether new entrants’ actual self-deployment of switching to serve mass-market

---

*the mass market*, that carrier should be counted as a separate, unaffiliated self-provider of switching. (Emphasis supplied.)

<sup>9</sup> *Triennial Review Order*, ¶ 499.

<sup>10</sup> *Id.* In both instances, the Commission relied on a definition of affiliation found in Section 3 of the Act (47 U.S.C. § 153(1)). *Id.*, n. 1550.

customers demonstrates that they have overcome economic and operational barriers to entry. An ILEC affiliate, particularly one that operates in sufficient proximity to the associated ILEC operation, is able to exploit the incumbency advantages that the Act explicitly attempts to offset through the requirement to make unbundled switching (and other UNEs) available at cost-based prices. Indeed, in some cases, the ILEC affiliate is able to make use of the facilities and/or personnel of the associated ILEC operation.<sup>11</sup> The ability of one ILEC affiliate to operate in another ILEC's service territory without access to the second ILEC's unbundled switching at cost-based prices does not provide probative evidence that unaffiliated competitors, lacking the incumbency advantages of an ILEC affiliate, would be equally able to overcome economic and operational barriers to entry in that geographic market.

12. In other instances, entry by ILEC affiliates is part of a "package" deal made to obtain other legal and/or regulatory approvals. For example, SBC agreed to enter a number of local markets as a condition of gaining approval of the merger with Ameritech.<sup>12</sup> Subsequent entry into local exchange markets by SBC's subsidiary,

---

<sup>11</sup> As is discussed in MCI's Comments, TDS—a competitor that SBC identified as a triggering CLEC in Michigan and elsewhere—has acknowledged that it leverages its ILEC assets in this manner.

<sup>12</sup> *Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses*, 14 FCC Rcd 14712, Appendix C, ¶ 59 (1999) (condition XXI) (committing to enter 30 out-of-region markets). Verizon entered into a similar agreement to gain approval of the merger of the former GTE and Bell Atlantic Corporations. *Application of GTE Corporation and Bell Atlantic Corporation for Consent* (continued)

SBC Telecom, reflects this requirement and does not necessarily demonstrate that such entry is, or is expected to be, profitable. Counting an ILEC affiliate such as SBC Telecom toward the trigger therefore fails to achieve the intended purpose of the triggers, which is to provide a shorthand method of determining the profitability and sustainability of local entry without use of unbundled local switching.

**2. Active and Continuing Participation in the Mass Market**

13. The Commission stressed that potential triggering carriers must be “actively providing voice service to mass market customers in the market.”<sup>13</sup> Moreover, the Commission required that the competitors in question must not have, for example, filed a notice to terminate service in that market<sup>14</sup> or provided other evidence demonstrating that they no longer intend to participate actively in that market.
14. The clear and logical intent of the Commission’s *Triennial Review Order* was to ensure that any competitor counted toward a trigger is an active and continuing participant in the relevant market. There are several ways in which a company that appears to be using its own switch to provide service via analog voice-grade

---

*to Transfer Control*, 15 FCC Rcd 14032, Appendix D, ¶ 43 (2000) (condition XVI) (agreeing to spend at least \$500 million on out-of-region entry).

<sup>13</sup> *Triennial Review Order*, ¶ 499.

<sup>14</sup> *Id.*, n. 1556.

loops (which the Commission termed “DS-0” loops) might, nonetheless, *not* be an active and continuing participant in the mass market.

a) *De minimis test*

15. For example, there are situations in which the *de minimis* number of stand-alone loops obtained by a carrier suggest that, *e.g.*, the carrier may be using those loops to test the technical feasibility of providing service via its own switch to mass-market customers, rather than to provide actual commercial service. As SBC itself proposed in state proceedings, it is appropriate to “screen out” competitors with extremely low loop counts in a particular wire center.<sup>15</sup> Applying such a screen reduces the likelihood of counting test lines (or outright billing system errors) as evidence of real switch-based competition.
16. Verizon’s California trigger showing is the poster child for the importance of such a common-sense screen. Verizon based its initial presentation solely on stand-alone UNE loop count data taken from its own billing records. Table 1 below reproduces Verizon’s summary of its trigger counts based on those billing data for the three Metropolitan Statistical Areas (“MSAs”),<sup>16</sup> in which Verizon proposed to “pull the trigger” on unbundled switching.<sup>17</sup>

---

<sup>15</sup> SBC eliminated from its trigger count CLECs that obtained fewer than five stand-alone loops per wire center.

<sup>16</sup> To be precise, Verizon proposed to eliminate access to unbundled switching in “Density Zone 1” in those three MSAs. “Density Zone 1” refers to the geographic area with the highest density of lines per square mile in Verizon California’s proposed geographically deaveraged pricing (continued)

**Table 1 – Summary of Verizon CA Initial Trigger Claims**

MSA	Density Zone	CLEC	Total
Los Angeles-Long Beach-Santa Ana	1	CLEC #033	4,513
		CLEC #003	715
		CLEC #074	2,017
		CLEC #086	4,745
		CLEC #026	28
		CLEC #053	1,747
		CLEC #030	31,454
Los Angeles-Long Beach-Santa Ana Total			45,219
Riverside-San Bernardino-Ontario	1	CLEC #033	1,932
		CLEC #085	1
		CLEC #026	1
		CLEC #030	7,262
Riverside-San Bernardino-Ontario Total			9,196
San Francisco-Oakland-Fremont	1	CLEC #074	376
		CLEC #085	296
		CLEC #026	1
San Francisco-Oakland-Fremont Total			673
Grand Total			55,088

17. In three instances (two in the Riverside – San Bernardino – Ontario MSA and one in the San Francisco – Oakland – Fremont MSA), Verizon identified a supposed triggering carrier that its own data showed as serving only one mass-market line in that MSA. (By definition, that means the CLEC in question allegedly obtained a single stand-alone loop in a single Verizon wire center in the MSA in question.)
- If Verizon had taken SBC's approach of "screening out" CLECs with a *de minimis* number of loops in any given wire center, it would have excluded these

---

scheme for UNE loops. Density Zone 1 contains most of the loops (and customers) in Verizon's service territory.

<sup>17</sup> Table 1 reproduces the material presented by Verizon in the public version of Attachment 3 to the December 12, 2003 testimony of Verizon witness Orville D. Fulp in CPUC docket R.95-04-043/I.95-04-044 (FCC Triennial Review 9-Month Phase).

CLECs from the trigger count. Excluding these CLECs, however, would have lowered Verizon's own trigger count to two—and thus would have eliminated the basis for even a *prima facie* claim to have met the retail trigger.

18. In the rebuttal round of the California proceeding, Verizon modified its trigger presentation to make use of CLECs' self-reported line count data. Significantly, in every instance in which Verizon had reported in its original study (based on its internal data) that a CLEC used either one or two mass-market loops in conjunction with self-provisioned switching, Verizon's workpapers for its rebuttal filing indicated that the CLEC reported no such loops. Verizon's rebuttal filing therefore showed only two CLEC triggers in each of the two MSAs where its original success in "counting to three" depended on including carriers with only a single loop in a single wire center.
19. This example illustrates the dangers of an "any loop will do" approach to the trigger count. At a minimum, the Commission should apply a reasonableness test to the data such as SBC's approach of excluding CLECs with fewer than five loops per wire center. That is not to say that the five-loop minimum is sufficient to eliminate all instances of data errors and/or inclusion of test lines. Application of such minimum cutoff, however, eliminates the need for further evaluation of the CLECs least likely to qualify as valid triggers.

*b) Qualitative test for active and continuing participation*

20. Some CLECs will pass this *de minimis* threshold even though they are no longer "active and continuing" providers of mass-market service. Thus, as the

Commission suggested in the *Triennial Review Order*, it is necessary to apply a qualitative test to eliminate all carriers that have, *e.g.*, filed a notice to terminate service in that market<sup>18</sup> or provided other evidence demonstrating that they no longer intend to be an active participant in that market.

21. ILECs in state proceedings attempted to narrow this test to the illustrative example provided in the *Triennial Review Order*—namely, filing of a notice to terminate service. The evidence from CLEC data responses and other sources, however, showed that a carrier may be “inactive” in the market for some time before it takes “active” steps (such as filing a notice to terminate service) to announce its inactivity. Hence, the Commission must take a broader view of the evidence to ensure that the trigger count does not include inactive carriers.
  - c) *Verification that the carrier is actively providing service to mass-market customers and plans to continue doing so*
22. The next step in the analysis addresses the fundamental question of whether the potential triggering carrier is providing service to *mass-market* customers and plans to continue doing so. Much of the controversy in state proceedings focused on this question. The ILECs’ mass-market trigger claims depended heavily on counting competitors that do not serve residential customers via their own switches and have not stated any intention of offering switch-based service to residential customers in the future. (Indeed, many of these carriers do not provide

---

<sup>18</sup> *Triennial Review Order*, n. 1556.



*any* service to residential customers, even via the UNE-Platform (“UNE-P”) or resale.) Exclusion of these carriers would, in many instances, bring the ILECs’ trigger count below the three-competitor minimum that the Commission established for eliminating the availability of unbundled switching at TELRIC-based prices.

23. Does the existence of switch-based service via analog, voice-grade loops to at least some business customers provide evidence that CLECs have overcome barriers to entry to the provision of mass-market services via self-provisioned switching? The evidence in the state proceedings suggests not.
24. If the CLECs in question were in the business of providing switch-based services to mass-market customers, they would have every motivation to eliminate their competitors’ access to UNE switching. Yet many of these CLECs stated openly and emphatically that they should not be counted toward the retail trigger because they do not serve mass-market customers. In each case, the CLEC in question appeared in the ILEC data as a firm obtaining at least a minimal number of stand-alone UNE loops that it used to provide switch-based service to business customers.
25. The CLEC data responses and other CLEC filings in state proceedings provide insight as to why that fact is not enough to establish that they are active and continuing providers of mass-market services via their own switches. For example, Birch Telecom, one of SBC’s claimed triggers in the Texas mass-market switching proceeding, stated:

Birch is not currently “actively providing” mass market voice services to business or residential customers via UNE-L. Birch inherited a very small legacy base of customers served via UNE-L in its merger with ionex Telecom, and is attempting to maintain this customer base. However, Birch has not utilized the UNE-L mode of provisioning to mass market customers since it assumed management control over the merged entity in March 2003 because to do so has proven to be economically and operationally impairing.<sup>19</sup>

26. Similarly, in the Michigan proceeding, AT&T witness Scott L. Finney testified that, in addition to providing *no* residential service, “all service being provided to small business customers is an artifact of a previous business plan that is no longer being pursued to provide service to new customers in Michigan.”<sup>20</sup> Since the termination of that business plan, any UNE-L provisioning by AT&T in Michigan has reflected only “maintenance of existing small business accounts [or] meeting the business needs of enterprise customers served on a DS1 level for ‘off lines’ at the analog voice grade.”<sup>21</sup>
27. KMC, another of SBC’s claimed triggers in Texas, provided a more detailed explanation of the circumstances in which an enterprise-level provider (such as

---

<sup>19</sup> Birch response to Sprint First Requests for Information, Request Sprint 1.1 in Public Utility Commission of Texas (“PUCT”) Docket No. 28607, Impairment Analysis of Local Circuit Switching for the Mass Market.

<sup>20</sup> Michigan Public Service Commission (“PSC”) Case No. U-13796, In the Matter of, on the Commission’s Own Motion, to Facilitate the Implementation of the Federal Communications Commission’s Triennial Review Determinations in Michigan, Tr. 3187 (Finney Rebuttal at 7).

<sup>21</sup> *Id.*, Tr. 3190 (Finney Rebuttal at 10).

KMC), might obtain a small number of stand-alone analog loops to provide service via its own switch:

There are two specific instances in which KMC may offer DS0 level services while marketing to DS1 level enterprise customers. First, existing business customers who order additional voice services from KMC may, on occasion, be at capacity on their existing DS1 facility, necessitating the provisioning of individual DS0 level facilities at an existing location. The second instance occurs when a prospective or existing customer wishes to include other locations into their service package, but those locations do not have sufficient volume to justify a full DS1. KMC would also provision individual DS0s to such locations.<sup>22</sup>

28. The statements of these companies—none of which would have any incentive to preserve access to UNE switching for mass-market customers if it were actually competing to serve the same customers using its own switch—demonstrate that evidence of business-only service via self-deployed switching says very little about the economics of serving mass-market customers without access to UNE switching. Instead, statements from these and other carriers (including carriers that I personally interviewed in conjunction with the California proceeding) confirm that UNE-L service to business customers tends to be incidental to an enterprise-only business plan.

---

<sup>22</sup> PUCT Docket No. 28607, KMC Response to Sprint's First Requests for Information, No. 1-2.j. KMC's second instance is an example of what AT&T witness Mr. Finney called "off lines." KMC Second Supplemental Response to SBC's First Requests for Information, No. 1-7.

29. Such incidental service (to provide, *e.g.*, a handful of analog lines for an enterprise customer to use for fax lines or to provide a few “spillover” lines for a customer that needs slightly more than the capacity of one DS-1 line) can be economic as part of a package of services provided under contract to a large customer, even when it would be uneconomic to provide the same number of lines via UNE-L to a small business or residential customer that did not require any other facilities or services. Distinguishing between incidental service to enterprise customers and true mass-market service via UNE-L, therefore, is not a matter of the number of DS-0 loops provided to a given location, but rather requires knowledge of the specific customer and the other services provided to that customer.
30. My colleagues and I conducted such analyses in California, Texas and Michigan, using the underlying billing data on which SBC based its trigger claims and, in some instances, comparing those data to internal data provided to us by MCI, one of the companies that SBC counted toward the retail trigger in those states. We were not able to perform an exhaustive analysis of each of the data points included in SBC’s trigger claims, but even the samples of data we were able to examine provided clear indications that many of the alleged instances of UNE-L service to mass-market customers were, in fact, examples of service to very large businesses that should be considered enterprise-level customers.
31. For example, a CLEC enterprise customer might be a company that provisions automatic teller machine (“ATM”) networks nationwide. In any given wire

center, however, that company may provide service to only one or two ATMs per address for a limited number of bank locations. SBC would count such a customer as having mass market loops at each location. For example, SBC's analysis in California<sup>23</sup> counts numerous loops for the MCI customer **\*\*\*BEGIN PROPRIETARY. END PROPRIETARY\*\*\***

32. Likewise, the ILEC approach would count as a "trigger" companies that specialize in serving payphone providers or Internet Service Providers ("ISPs"), which typically aggregate customers and may serve dozens, hundreds or thousands of different locations over a large area—even if the supposed "trigger" actually only provides service to a handful of enterprise aggregator customers at a given location.
33. Examining SBC's California data strongly suggests, for example, that SBC should not have counted **\*\*\*BEGIN PROPRIETARY END PROPRIETARY\*\*\*** as a trigger at all (or in many areas) because many or most of the lines that SBC counts as "mass market" lines are used to serve a handful of payphone service

---

<sup>23</sup> This discussion of SBC's California analysis relies on proprietary data from SBC's CABS billing system, which was provided as Ex. 82C in the California mass-market switching proceeding. The following steps were used to obtain the data referenced herein: (1) Sort the database first by the "CLLI 8" and then by the "Address" fields; (2) For all records with identical "CLLI 8" and "Address," sum the values in the "SumOfCircuits" field to obtain a total; (3) Extract all records from the database that are part of a CLLI 8/Address group with a total SumOfCircuits that is less than 4; (4) Resort the extracted data by the "Subscriber," then "Address." The resulting file reproduces the loops that SBC reported as "mass market" UNE-L services with customer names included and all records sorted by customer name. The results of this analysis were described at pages 55 through 58 of MCI's Reply Brief in the California proceeding, filed on May 13, 2004.

aggregators and or/ISPs. Thousands of this CLEC's loops would appear as "mass market" service using the ILEC data for **\*\*\*BEGIN PROPRIETARY. END PROPRIETARY\*\*\***

34. It is unrealistic for the Commission to perform this kind of detailed analysis in the time allotted for this proceeding. There is, however, a simpler and quicker alternative that eliminates such "false positives" from the trigger count without requiring a high level of detail about the customers served via UNE-L facilities. The Commission can "screen out" all claimed triggers that do not provide service to residential customers via their own switches.
35. Application of this standard would help to ensure that all, or virtually all, mass-market customers within a given geographic market have significant competitive alternatives and thus is consistent with the pro-competitive goals of the Act and this Commission. To date, UNE-P has proven to be the most successful and widespread vehicle for providing mass-market customers with competitive alternatives to the incumbents' retail local exchange services. By its very nature, UNE-P allows competitors to offer alternatives to each and every customer that the ILEC serves. Eliminating access to unbundled switching is inherently anti-consumer unless the Commission can be very sure that *all* of the customers who can be served via UNE-P can also be served through some alternative form of competitive entry.
36. If the Commission does not apply the trigger analysis in this manner, then it should consider defining separate markets for residential and small business

customers to avoid the public policy harm that I describe above. The small business submarket would include all business customers up to the identified boundary between mass-market and enterprise customers.

### **3. Intermodal Competition**

37. The Commission's *Triennial Review Order* required that intermodal competitors counted toward the retail trigger must be offering retail service that is comparable in "cost, quality and maturity" to the incumbent's switched mass-market voice services.<sup>24</sup> MCI's Comments provide a detailed discussion of intermodal alternatives, showing that the Commission correctly excluded Commercial Mobile Radio System ("CMRS") carriers<sup>25</sup> and fixed wireless providers<sup>26</sup> from counting toward the mass-market switching triggers. MCI's Comments further explain why cable companies and VoIP ("Voice over Internet Protocol") providers should be excluded from the trigger count.

### **4. Scale of Market Participation**

38. The Commission's national finding of impairment for mass-market switching was based on barriers to entry associated with the hot-cut process.<sup>27</sup> None of the

---

<sup>24</sup> *Triennial Review Order*, n. 1549. See also ¶ 97.

<sup>25</sup> *Id.*, n. 1549. The Commission defines CMRS carriers as "any mobile service, as defined in section 3 of the Act, as amended, provided for profit and making interconnection services available to the public." *Id.*, n. 164, citing 47 U.S.C. § 332(d)(1). This definition includes, but is not limited to, traditional cellular carriers.

<sup>26</sup> *Id.*, ¶ 310.

<sup>27</sup> See, for example, *Triennial Review Order*, ¶ 465.

above criteria directly addresses this issue, nor does any of these criteria address the several other potential economic and operational barriers to entry that the Commission identified. Thus, a further screen is implied by the very logic of the trigger mechanism. The triggers provide a simple surrogate for a more detailed analysis of the various barriers to entry. Satisfaction of the trigger in a given market is supposed to eliminate the need for further analysis of barriers to entry because the trigger evidence itself demonstrates that barriers to entry are sufficiently low that they do not constitute a source of impairment.<sup>28</sup>

39. The Commission's own evaluation of evidence concerning the hot-cut barrier to entry suggested that a carrier must have reached some minimum scale to demonstrate that it had overcome this barrier to entry. For example, the Commission cited the 25-35 loops that McLeod attested to be the *daily maximum number of hot cuts per central office* in the SBC Midwest region as evidence of the insufficiency of the ILEC hot cut process.<sup>29</sup>
40. Moreover, although the Commission based its national finding of impairment strictly on problems related to the hot-cut process, it specifically found that there might be additional barriers to entry relating to cost disadvantages arising from a new entrants' ability to achieve economies of scale.<sup>30</sup> Evidence of the actual

---

<sup>28</sup> *Triennial Review Order*, ¶ 494.

<sup>29</sup> *Id.*, ¶ 468.

<sup>30</sup> *See, for example, id.*, ¶ 480.



deployment of switching to serve a handful of mass-market loops cannot demonstrate that CLECs have overcome entry barriers related to scale economies.

41. The FCC further cited the low volumes of service via self-deployed switching to residential customers as supporting its national finding of impairment.<sup>31</sup> The three percent (combined) residential market share that the Commission found to be insufficient on a national basis is a far higher threshold than implied by the “*de minimis* test” applied by SBC (a minimum of five loops per wire-center).
42. Both common sense and economic logic support the kind of “sufficiency of scale” test implied in the passages from the *Triennial Review Order* discussed above. Without such a screen, the retail trigger could be satisfied by three enterprise-market CLECs that each experimented (unsuccessfully) with serving a handful of their own employees’ homes from an existing switch and collocation arrangement. As long as the three CLECs left these test loops in place, the ILECs would deem the retail trigger to be met. Yet, such a circumstance would not provide the slightest evidence that “multiple, competitive supply” is feasible in the defined geographic market.<sup>32</sup>
43. To avoid such an illogical outcome, the final test I propose is a “sufficiency of scale” measure. This test determines whether the volumes at which the potential triggering company is presently providing service demonstrate that it has

---

<sup>31</sup> *Id.*, ¶ 438.

<sup>32</sup> *Triennial Review Order*, ¶ 506.